

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

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P/S

74-1019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

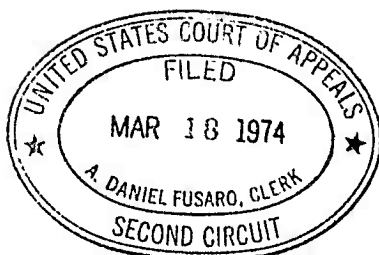
BIENVENIDA MARTINEZ,

Appellant.

Docket No. 74-1019

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the District Judge's charge on "defendant's
interest" was error.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Dudley B. Bonsal) entered on December 28, 1973, after a jury trial, convicting appellant Bienvenida Martinez of two counts (counts one and three of the indictment) of forging an obligation of the United States, in violation of 18 U.S.C. §495. Imposition of sentence was suspended, and appellant was sentenced to a term of probation for two years on each count, the terms to run concurrently, with the special condition that she obey the directions of the United States Immigration and Naturalization Service.

The Legal Aid Society Federal Defender Services Unit was continued as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was indicted for forging (Counts 1 & 3) and uttering (Counts 2 & 4) two United States Social Security checks. It was undisputed at trial that appellant endorsed the

name of Bessie Smith Donald on two November 1971 (15*) Social Security disability checks** made payable to Mrs. Donald (Government's Exhibit #3 and #4; see 23), and that the signatures were made without Mrs. Donald's authorization (16). It was also undisputed that the proceeds of these checks were deposited in appellant's savings account.*** The defense was that appellant intended to return the proceeds of the checks.

The evidence produced by the government included four pre-trial statements by the appellant. In the first statement to a bank employee made in 1972, appellant said that the checks had come from her mailbox (37). She also stated that the bank would probably have trouble with two other checks like the two in question which had been used by a customer of hers to pay her money owed.

The second statement was given at an interview held on May 16, 1973 (48) with Secret Service Agent Soden. He

*Numerals in parentheses refer to pages in the transcript of the trial.

**One check was to Mrs. Donald in the amount of \$143.90. The other was to Mrs. Donald for her children in the amount of \$75.00.

***The amount actually credited to the account of \$179.30 (40), because of an error in addition in the deposit slip.

asked appellant if she had any knowledge of the checks (50). Appellant said she had received two checks from a man from Santo Domingo in payment for \$20 he owed her, and he was to return for the remainder of the money. Appellant deposited the money, including the excess, in her bank account when he failed to return (50).

A second meeting took place later that day. Appellant was shown photographs of two checks, and she said she got them in the mail because her sister was living at the same address as that on the check. Appellant then dictated a statement (55) in which she acknowledged endorsing the two Donald checks and depositing them (82).

The next day, appellant stated to the Assistant United States Attorney that she had received the checks in the mails and had deposited them in her account. She said she realized she had done something wrong.

Appellant testified on her own behalf. The essence of her defense was that she received three checks - one from her customer and the two Donald checks from the mailbox. She said she deposited the checks in her account to safeguard the money and to return it to the rightful owner when he or she showed up (66).

Appellant explained that at the meeting at the bank she told officials that she had a check in her account to

cover a \$20 debt owed to her and that when the payee of the check failed to return for the remainder of the money she deposited it in her account (69). Thus, she said there was money in the account that did not belong to her. The bank official told appellant that money could not be withdrawn until a claim was made (68).

It was also shown that eight days after the money was deposited, appellant withdrew \$1,000 from the account and that she returned it thirteen days later. During these thirteen days the account had only \$20. However, after appellant returned the funds, the account at all times covered the amount of the checks (46-47).

The government argued in summation that the testimony about the customer's check was actually a story to cover her alleged forgery and uttering of the Donald checks and was thus a false exculpatory statement. The judge charged that if this was a false exculpatory statement, it was evidence of a consciousness of guilt. He left it to the jury to decide from the evidence whether the appellant's version of the events was correct, or whether the statement was a "false" cover.

In the charge to the jury, the Judge stated:

You heard several witnesses for the government and Mrs. Martinez testify herself, and you, the jury, are the exclusive judges of the credibility of those witnesses. And of course it is the quality of the testimony, the testimony you think represented the true picture of what happened here, and in considering the credibility of these witnesses, ladies and gentlemen, again please use your plain, everyday common sense. You saw the witnesses on the stand. How did they impress you?

Did you think they are testifying frankly, candidly, and fairly?

So apply your common sense and experience just as you are called upon in determining an important matter in your own lives when you are called upon to decide whether you have been given a true picture of a given situation. I think you would take into account a witness' demeanor, or his background, occupation or business, a witness' candor or lack of it, a witness' possible bias, and you would consider whether a witness has been contradicted or supported by other credible testimony or circumstances.

Mrs. Martinez took the stand. She obviously has a vital inter-

est in this case, she is the defendant. And her interest is one of the matters that you should take into consideration in determining the credibility which you give to her testimony. You obviously should consider her testimony with great care. But of course you may conclude that Mrs. Martinez was telling the complete truth to you, despite her interest in the outcome of this trial.

(121-122)

Counsel objected to the charge on the defendant's interest (125).

After the jurors' deliberations, they found the appellant guilty of forging the checks, but did not reach a verdict on the uttering counts. Subsequently, these latter counts were dismissed.

ARGUMENT

THE INSTRUCTION ON "DEFENDANT'S
INTEREST" WAS ERROR.

In his charge to the jury, the Judge instructed:

Mrs. Martinez took the stand.
She obviously has a vital interest
in this case, she is the defendant.
And her interest is one of the mat-
ters that you should take into con-
sideration in determining the credi-
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timony. You obviously should con-
sider her testimony with great care.
But of course you may conclude that
Mrs. Martinez was telling the com-
plete truth to you, despite her
interest in the outcome of this
trial.

(122)

While it is clear that a judge is permitted to
instruct on a defendant's interest in the case and its
outcome, Reagan v. United States, 157 U.S. 301 (1895); United
States v. Mahler, 363 F.2d 673, 678 (2d Cir. 1966); United
States v. Sullivan, 329 F.2d 755 (2d Cir.), cert. denied, 377
U.S. 1005 (1964), the judge must not tell the jury directly
or indirectly that the defendant is to be disbelieved be-
cause he is a defendant. Reagan v. United States, supra, 157
U.S. at 310. In this case, the last portion of the above-
quoted charge was error because it implied that as a general

rule, the defendant's interest precluded truthfulness, although there were exceptions to this situation. It permitted the jury to start its deliberation predisposed to believing that defendants lie although able to find exceptions in certain circumstances. What the charge should have assured was that the jury would evaluate the appellant's credibility on its own merits and that her interest was one factor to be considered.

Further, the Judge told the jurors that they may consider appellant was telling the complete truth despite her interest. This must have made the jurors believe that unless they could believe everything the appellant said, they could convict. This principle is error for the jury is always free to reject one portion of a witness' testimony but accept another.

Counsel objected to the instruction, but to no avail. The Court should have taken the opportunity to consider the additional language which would have made clear that the defendant's interest does not compel an initial premise of falsehood which must be overcome in jury deliberations.

The prejudice to the appellant is apparent. The ground for the defense was that appellant did not intend to keep the money, but only to hold it for safekeeping. This

was something that the appellant could establish only through her own testimony and thus her credibility was critical. If that testimony was disbelieved, a conviction naturally followed from the stipulated facts. Thus, the charge on appraisal of the appellant's testimony was critical.

CONCLUSION

For the above-stated reasons, the judgment of the District Court should be reversed and the case remanded for a new trial.

Respectfully submitted,

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March 8, 1974

Certificate of Service

March 8, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Philip Albert Benson